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In The

Supreme Court of the United States

E. JEAN JOHNSON and BASILIO FONTANA,

Petitioners,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENT, NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners E. Jean Johnson and Basilio Fontana submit their Reply Brief to Respondent National Association of Letter Carriers, AFL-CIO's ("NALC") Brief in Opposition to Johnson and Fontana's Writ of Certiorari. NALC argues it responded to several appeals made by Johnson and Fontana prior to the October 26, 1993 (submitted by Branch 1100 to Respondent NALC on November 29, 1993)[1] appeals it did not respond to and that therefore NALC evidenced an ***"intent to overturn the Branch's actions"*** on those appeals to which it did not respond. NALC asserts this theory even though the only one appeal from Johnson and one appeal from Fontana were overturned by Respondent. Those appeals were from Branch actions based on the **Felde charges only.** NALC argues that the appeals made by Johnson and Fontana from Branch actions, first expelling them based on the Rotcher charges and then suspending them on the MacDuffee charges in the same meeting, were for suspensions only, entirely

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[1] Article 11 of the CGSFB provides in pertinent part:

Section 2. When an appeal from the action of the Branch is taken, the following rules must be observed:

First: The appeal must be in writing and filed with the recording secretary of the Branch, together with any written testimony, arguments and briefs, within twenty days from the date of the Branch meeting at which the decision to be appealed from was made.

* * *

Third: The Branch shall then be allowed twenty days to prepare its reply which shall be in writing with the seal of the Branch attached thereto.

A copy of this reply shall be immediately transmitted by the recording secretary to the appellant. The recording secretary shall also immediately transmit the appeal, together with all testimony, arguments, briefs and evidence submitted by the appellant and the reply of the Branch thereto via registered mail, to the Chairman of the Committee on Appeals of the National Association.

ignoring the expulsions. Thus, Respondent NALC completely avoids and fails to address the October 26, 1993 appeals (submitted to Respondent NALC on November 29, 1993) of Johnson and Fontana for being **expelled from union membership** based on the Rotcher and MacDuffee charges.[2] (For the October 26, 1993 appeals, see Appellant Johnson ER, Vol. I, pp. 184 & 212; for the November 29, 1993 submission to NALC, see Appellee NALC SER, Vol. III, pp. 770 & 793.[3]) As soon as Petitioners were expelled on October 7, 1993, the suspension penalties on the Felde and MacDuffee charges were ineffective, moot and superseded by the expulsions. (See Appellant Fontana ER, Vol. I, pp. 132, 133, 134, 135.)

NALC argues that Johnson and Fontana were expelled for failure to pay union dues as suspended members, continuing to ignore the fact that both petitioners were expelled from union membership on October 7, 1993 and were no longer required to pay any union dues. Respondent supports this contention by referencing the findings of fact made by the District Court. These findings do not address the expulsion of either Johnson or Fontana made on October 7, 1993 from which they appealed and never received a response.

Respondent NALC's argument regarding ratification is irrelevant to the issue presented in the Writ for Certiorari and will not be discussed in this reply brief. Further, in the Writ, Petitioners Johnson and Fontana are not addressing or calling into question what kind of investigation is required of Respondent NALC by its constitution and the LMRDA, just that a review be done in accordance with the requirement of providing the appealing union member with procedural due

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[2] Contrary to Respondent NALC's assertion in Footnote 8, p. 17 of its opposition brief, the Ninth Circuit reversed the District Court's grant of summary judgment as to Branch 1100 on the ground that the charges made by Felde, Rotcher and MacDuffee were ***insufficiently specific*** to comply with LMRDA, 29 U.S.C. Sec. 411(a)(5).

[3] Reference to ER is Excerpts of Record filed in the appeal to the Ninth Circuit District Court of Appeals. Reference to SER is Supplemental Excerpts of Record filed in the appeal to the Ninth Circuit District Court of Appeals.

process. The fact that Petitioners did not argue some obligation of the NALC to conduct a certain kind of investigation is wholly irrelevant to Respondent NALC's obligation to review and respond to appeals as required.

None of these arguments address the issue presented in the Writ for which Petitioners seek review, that they were denied the procedural due process guaranteed them by the NALC constitution and the LMRDA, and are, therefore, irrelevant. All of these arguments should fail for reasons discussed below.

First, the issue presented in the Writ by Johnson and Fontana deals with the requirement of the NALC to respond to all appeals as required by its constitution and the LMRDA. The "intent to overturn the Branch's actions" is not a valid factor allowing a waiver of the requirements found in the NALC constitution, the LMRDA or any case law. There is no such theory of "intent".

Second, by avoiding any discussion of expulsion (as it has done throughout this entire litigation) and selecting facts favorable to its theory of expulsion based on non-payment of dues, Respondent NALC hopes to direct belief of the Court that Johnson and Fontana were merely suspended by Branch 1100 based on all the charges made by Felde, Rotcher and MacDuffee and were thereby required to continue paying union dues. This simply was not the case.

Third, NALC's argument that Johnson and Fontana were expelled for failure to pay union dues and that the Writ is moot is not supported by the evidentiary record and again, is irrelevant to the issue raised in the Writ.

Petitioners believe they are obligated to the Court to point out in this reply brief any perceived misstatements made by Respondent NALC in the opposition brief as stated in *Supreme Court Rule 15(2).*

I. ARGUMENT

A. Prior Responses To Appeals Or Any Evidence Of An "Intent To Overturn The Branch's Actions" Is Irrelevant.

NALC describes various charges against Fontana to remove him as President and its response to his appeal from that removal from office. There is no explainable reason for Respondent to describe, in detail, each and every charge resulting in this removal since none of this information is relevant to the issue stated by Petitioner in the Writ, that failure to respond to appeals is a violation of Petitioner's due process rights. This information actually shows that Respondent NALC responds to the appeals it chooses to and shows its intent to support Branch 1100 actions because it denied that particular appeal and supported the Branch action of removal from office. (Respondent's Brief in Opposition, p. 8.) It is clear from NALC's discussion that it recognizes its duty and legal obligation to respond to all appeals as part of its due process requirement owed to all NALC union members.

At no point in the opposition brief does Respondent address its failure to respond to the October 26, 1993 (submitted by Branch 1100 to Respondent NALC on November 29, 1993 for review) appeals from expulsion made by Johnson and Fontana. Nor, does it deny such failure to respond. Respondent, instead, alleges only suspensions.[4]

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[4] It should be noted that NALC mistakenly represents that the appeal Fontana made from Branch 1100 actions taken on September 14, 1993 was based on the MacDuffee and Rotcher charges when, in fact, it was based on the Felde charges only for which the Branch suspended his membership. (The same occurred to Petitioner Johnson.) This is explained and supported in the Petitioner's Writ of Certiorari, p. 4 and p. 5. The Branch 1100 expulsions of Johnson and Fontana were based on the Rotcher charges and that expulsion did not take place until the October 7, 1993 Branch meeting. NALC's representation that Fontana ceased paying his union dues at any time is an egregious misrepresentation regardless of the District Court's finding of fact. (Where that finding of fact came from Petitioners have no idea since there is nothing in the evidentiary record to support such a

The failure of Respondent to respond to the appeals left Petitioners expelled from union membership permanently and irrevocably thus denying Petitioner Johnson her livelihood and Petitioner Fontana the right to run again for union office.

Finally, Respondent presents no legal support or legal precedent for the theory of "intent" as sufficing in place of a response to an appeal. The most telling failure and evident irrelevance of this theory is the fact that even Branch 1100 did not get it ("the theory"). Branch 1100 has never acknowledged recognition of any "intent" on the part of Respondent NALC to overrule the Branch's actions in expelling both Petitioners. Quite the contrary, the record shows that Branch 1100 believes its action of expulsion against Johnson and Fontana on October 7, 1993 was valid and supported by the NALC since it did not receive a response. Consequently, Petitioners were treated as expelled members by the Branch beginning October 7, 1993. It is undisputed that neither Johnson nor Fontana were expelled before that date or at any time in 1993.

Any assertion by Respondent that the response on November 10, 1993 was a response to all of the appeals (Felde, Rotcher and MacDuffee) is again, a misrepresentation of fact. Respondent NALC, in its argument before the Ninth District Circuit Court of Appeals admitted it did not respond to all of the appeals. (See Petition for Writ of Certiorari, App. 69 and 70.) The November 10, 1993 response upheld Johnson's and Fontana's appeals from Branch actions of suspension based on the **Felde charges only.** By referring to "appeals" in general, Respondent hopes to confuse and mislead the Court as it did at the District Court level and the

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contention except a self-serving declaration made by one of the defendants with no support of any kind.) Fontana never ceased paying his dues during the entire time in question. Fontana never received any letters informing him of being expelled for non-payment of dues and no date of expulsion has ever been identified by the Branch or Respondent NALC simply because it did not happen. Expelled members are not required to pay dues as they are non-members of the union.

Ninth Circuit Court level. The following is the undisputed time line with supporting references in the record:

August 10, 1993	Johnson and Fontana are allegedly served with the Felde charges and are served with the Rotcher and MacDuffee charges. (Appellee Branch 1100 SER, Vol. III, pp. 471, 472, 474, 475, 476, 478.)
Sept. 14, 1993	Petitioners are **suspended** from membership based on the **Felde** charges. (Appellant Johnson ER, Vol. I, pp. 243-244, & 245.)
Oct. 4, 1993	Johnson and Fontana file an appeal to the suspension action taken by the Branch based on the **Felde charges only**. (Appellee NALC SER, Vol. III, pp. 650 & 704.)
Oct. 7, 1993	Johnson and Fontana are **expelled** by the Branch based on the **Rotcher charges** and suspended by the Branch based on the MacDuffee charges. (Appellant Fontana ER, Vol. I, pp. 132, 133, 134 & 135.)
Oct. 25, 1993	A letter is mailed to Johnson notifying her she is arrears in dues.[5] (Appellee Branch 1100 SER, Vol IV, p. 708.)
Oct. 26, 1993	Johnson and Fontana's **Felde appeals** are sent to Respondent NALC by Branch 1100 for review. (Appellant Johnson ER, Vol. II, p. 404; Appellant Fontana ER, Vol. II, p. 492.)
Oct. 26, 1993	Johnson and Fontana submit their appeals from the Branch action of **expulsion based on the Rotcher charges** and suspension based on the MacDuffee charges to the Branch. (Appellee NALC SER, Vol. III, pp. 770 & 793; Appellant Johnson ER, Vol I, p. 184 & 212.)

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[5] Fontana never received any such letter, nor did he ever receive notice from the Branch that he was expelled for non-payment of dues. There is no evidence in the record supporting this alleged fact. The record shows Fontana paid his dues via withholding from his retirement check throughout the entire time in question.

Nov. 10, 1993	Johnson and Fontana receive a response from Respondent NALC sustaining their appeals from suspension based on the **Felde charges only**. (Appellee NALC SER, Vol. III, pp. 831, 832, pp. 829, 830.)
Nov. 29, 1993	Branch 1100 sends Johnson and Fontana's appeals from Branch action based on the **Rotcher charges (expulsion)** and the MacDuffee charges (suspension) to Respondent NALC for review. (Appellant Johnson, ER, Vol. I, p. 202; Appellant Johnson, ER, Vol. II, p. 420.)
March 25, 1994	A letter is mailed to Johnson from the Branch notifying her she has been expelled for non-payment of dues.[6] (Appellee Branch 1100 SER, Vol. IV, p. 710.)

B. Respondent NALC Fails To Discuss Petitioners' Expulsions.

It is clear to these Petitioners that Respondent NALC discussed only Petitioners' suspensions because suspended members are required to pay union dues while suspended. That being the case, Respondent could argue two points, (1) that Petitioners were expelled for not paying dues and (2) since they were allegedly expelled for non-payment of dues, Petitioners would have no effective remedy and Respondent,

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[6] It is undisputed that prior to March, 1994, no Branch 1100 union member had ever been expelled for non-payment of dues even though some, including national union officers, were months and years in arrears and in some cases, over a thousand dollars in arrears. (Appellant Johnson, ER, Vol. II, pp. 436 through 464.) Some of the dues notices contained a note, "We will not drop you for your information only." (Johnson ER, Vol. II, p. 446.) A union cannot enforce dues requirements in a discriminatory fashion against certain members, while other members are allowed to fall behind on their payments for protracted periods with impunity. *Lang v. Consolidated Rail Corp.*, 579 F. Supp. 705, 709 (1984); *Burch v. IAM and Aerospace Workers, AFL-CIO*, 337 F. Supp. 303, 306 (9th Cir. 1971). Such violations constitute a violation of the LMRDA, 29 U.S.C. Sec. 411(a)(1).

then had no obligation or legal duty to respond to Petitioners appeals.

The failure to address the fact of the expulsions on October 7, 1993 by either affirming or denying them is crucial to the credibility of Respondent NALC. The obvious reason for this failure to discuss the expulsions is that if Petitioners Johnson and Fontana were expelled rather than suspended on October 7, 1993, they could not have been expelled for non-payment of dues. There is no provision in the NALC constitution or in any law or case that gives the union any control over an expelled member. In this case, Branch 1100 dissolved the union-member relation with Petitioners on October 7, 1993. Up to and including October 7, 1993, Petitioners were considered members of the NALC. After October 7, 1993 Branch 1100 and the NALC had no more control over the former members than it had over the man in the street. Petitioners could not have been expelled for non-payment of dues because they were already expelled.[7]

It is clear that (1) Respondent NALC did not respond to Petitioners' appeals from the Rotcher expulsion and the MacDuffee suspension submitted to it on November 29, 1993, (2) Respondent's failure to respond resulted in a violation of Petitioners right to procedural due process required of Respondent by its constitution and by the LMRDA, (3) Respondent knew it was required to respond and did not do so, and (4) Respondent NALC knew it did not have to provide procedural due process because Petitioners would have no viable remedy against it for ignoring the law.

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[7] It should be observed that nowhere in Respondent's opposition brief does Respondent deny receiving the appeals by Petitioners from expulsion nor does Respondent deny the fact that it did not respond to those appeals made by Petitioners. To the contrary, by making the suspension/failure to pay dues argument, Respondent tacitly admits it received the appeals and did not respond.

C. Respondent's Argument That Petitioners' Were Expelled For Failure To Pay Dues Rendering Petitioners' Writ For Certiorari Moot Is Irrelevant.

Respondent's argument regarding any failure of Petitioners to pay dues has been discussed and is a factual argument **entirely irrelevant** to the issue in Petitioners' Writ. The Writ is clearly based on Respondent NALC's complete failure to respond to their appeals from expulsion from union membership by Branch 1100 on October 7, 1993. If Respondent alleges that, instead, Petitioners were expelled for non-payment of dues, the question then arises, when were Johnson and Fontana expelled for non-payment of dues? And, arguendo, if they had been expelled for non-payment of dues, prior to October 7, 1993, there would have been no appeals in October or November, 1993. In fact, Respondent NALC did not and cannot give any dates prior to October 7, 1993 or indeed, anytime in 1993, when Petitioners were expelled for non-payment of dues. Finally, Respondent NALC has provided no provision in its constitution, no Federal law, no case that relieves it of its legal, mandated duty or gives them a right to subvert the law and not provide Petitioners with their rights to due process even if they had been expelled members. **Thus, the dues issue raised by Respondent has absolutely no bearing on the issue petitioned for review in the Writ and the entire argument should be rejected.**

Respondent's argument that the issue raised in the Writ for Certiorari is moot is misplaced and irrelevant. Again, this argument is based on the allegation that Petitioners were expelled for non-payment of dues. It is evident that Petitioners' Writ is not moot. The injury suffered from the expulsion on October 7, 1993 continues to this day and into the future for as long as each Petitioner would have remained members of the Union. Had Respondent NALC appropriately responded to Petitioners' appeals, Branch 1100 would have had to remove the expulsions and both Petitioners would still be union members today. NALC union membership meant a living for Johnson and probable union office for Fontana. As stated by Respondent, the test for mootness is whether the relief sought would, if granted, make a difference to the legal

interests of the parties. *Airline Pilots Assn., Int'l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990), citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Both Petitioners should have a means to seek the economic damages they have suffered against Respondent NALC's for failure to respond to their appeals.

The ability to hold a national union liable for violation of its own constitution and the law is necessary for all union members in the United States. National unions should not be able to flaunt the law with impunity and disregard the law by taking the working union members' dues and then not providing those members with what the law requires. The issue raised in Petitioners' Writ is not moot.

II. CONCLUSION

Respondent NALC's entire opposition is factual argument that is irrelevant to the issue at hand. Petitioners are not seeking a review of the evidence or a discussion of specific facts, but rather a review of the law requiring national unions to provide procedural due process to its members and at the same time, does not hold a national union accountable to its members for violation of the law. Union members have no feasible method of holding national unions accountable for violations of their rights guaranteed by the LMRDA.

For all of the foregoing reasons, this Court should reject Respondent NALC's arguments and grant Petitioners Johnson and Fontana's Petition for Writ of Certiorari.

Respectfully submitted,

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